

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Establish  
Policies and Cost Recovery Mechanisms for  
Generation Procurement and Renewable  
Resource Development.

Rulemaking 01-10-024

**ADMINISTRATIVE LAW JUDGE'S RULING  
CONCERNING DRAFT PROTECTIVE ORDER**

Attached to this ruling is a form of protective order that is intended to deal with the treatment of materials that are designated as confidential and proprietary by the respondents in this proceeding, Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison) and San Diego Gas & Electric Company (SDG&E). As noted in the Assigned Commissioner's Ruling Establishing Category and Providing Scoping Memo (Scoping Memo) issued in this docket on April 2, 2002, the undersigned led a discussion at the January 8, 2002 prehearing conference (PHC) concerning the draft protective order submitted by Edison as Appendix B to its November 26, 2001 response to the Order Instituting Rulemaking (OIR). At that time, I noted that the form of protective order proposed by Edison raised a number of troubling issues, and that substantial modifications would be necessary. Counsel for Edison agreed to prepare and circulate a revised draft of the protective order addressing my concerns, and then to hold a conference call with interested parties regarding the revised draft.

Edison circulated a revised form of protective order on January 15, 2002, and a conference call concerning the revised draft was held among the interested parties later that day.<sup>1</sup> Edison then prepared a memo summarizing the differences among the parties during the conference call, and that memo plus the revised draft formed the basis for discussion during a second conference call held on January 18, 2002, in which I participated.<sup>2</sup> At the conclusion of the January 18 conference call, I directed that further changes be made to the proposed draft and circulated so that all parties could review them.

Edison circulated a second revised draft by e-mail on January 24, 2002, and a lengthy conference call concerning that draft took place on January 28th.<sup>3</sup> During the January 28 conference call, I gave the parties further guidance on how I thought some additional issues should be resolved, and asked Edison to circulate a new draft reflecting these revisions. I also indicated that in view of the differences that still existed among the parties, the next (and hopefully final) draft of the protective order would be prepared by me. Edison made the

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<sup>1</sup> The parties participating in the January 15 conference call, in addition to Edison, were representatives of the California Energy Commission (CEC), the Independent Energy Producers (IEP), the California Department of Water Resources (DWR), the California Large Energy Consumers Association (CLECA), and the Federal Executive Agencies (FEA).

<sup>2</sup> Additional parties participating in the January 18 conference call were representatives of PG&E, SDG&E, the California Consumer Power and Conservation Authority (CPA), the Cogeneration Association of California, Western Power Trading Forum (WPTF) and Caithness Energy LLC. All of parties who participated in the January 15 conference call were also on the January 18 conference call except for FEA.

<sup>3</sup> Apart from Edison, PG&E and SDG&E, the only other parties who participated in the January 28 conference call were the CEC, IEP and WPTF.

requested revisions and circulated its new draft (along with some alternative language it preferred) on January 31<sup>st</sup>.

In view of this history, it is apparent that the attached draft protective order represents the outcome of a good deal of discussion and compromise among the parties, along with determinations made by me. The purpose of this ruling is to give a sense of the structure of key provisions of the protective order, along with an explanation of the judgments I have made on issues as to which the parties could not come to agreement.

### **Overview on Key Issues**

One of the most extensively-discussed issues in the conference calls was the extent to which the determinations by this Commission<sup>4</sup> about which records should be treated as confidential would bind other government agencies participating in this proceeding. The issue arose because of the regulations applicable to the CEC, which generally require that if a party seeks access to records the CEC has treated as confidential, the determination whether the records should be released will be made by the CEC's Chief Counsel. Under the CEC's regulations, there is also a policy in favor of disclosure if, in the CEC's judgment, the data at issue has been masked or aggregated sufficiently. (*See*, Title 20, California Code of Regulations, §§ 2506-2507 and 2501-2511 generally.) Edison expressed concern that these regulations set up the potential for a conflict between the CPUC and the CEC if the two agencies were to reach different determinations as to the need for confidentiality regarding particular data.

The attached protective order deals with this question by adopting the procedure agreed to by the CPUC and the CEC in connection with Resolution

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<sup>4</sup> Hereinafter, this Commission will be referred to as either "Commission" or "CPUC".

L-277, which authorized this Commission to share with the CEC, data on direct access sales organized by service area and Electric Service Provider (ESP). Under Resolution L-277, the CEC was required to specify the confidential data to which it wanted access, and to agree that it would continue to honor the CPUC's confidentiality determination notwithstanding the policies and procedures set forth in its own regulations. The CEC specifically agreed that if it requested confidential direct access data be made public but the CPUC declined, the CEC could appeal that determination under the CPUC's Rules of Practice and Procedure, but would continue to honor the CPUC's confidentiality designation unless or until the Commission's decision was reversed. Paragraph 7(a) and Appendix B of the draft protective order adopt these same procedures for data designated as confidential in the procurement proceeding.<sup>5</sup>

The treatment of the CEC indirectly raises the issue of how much access other state governmental agencies should be granted to data that is designated as confidential in this proceeding. Because no agency other than the CEC has yet stated that it will want access to confidential data, the draft protective order does not attempt to answer definitively the question of which other agencies should be granted such access, but it does contain a procedure by which access can be obtained. More specifically, if the requesting agency is considered a non-market participant under paragraph 3(g)(1), it can be granted access to confidential data under the draft protective order provided that it is authorized to enter into an agreement of the kind contemplated by Government Code § 6254.5(e), *i.e.*, an

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<sup>5</sup> It should be noted that Appendix B of the Protective Order goes beyond the CPUC-CEC agreement approved in Resolution L-277 because it also deals with situations where the CEC uses confidential data from this proceeding to develop algorithms and similar computations for CEC computer models. *See*, Appendix B, ¶7.

agreement to keep confidential data that it receives from another agency, and that the other agency has designated as confidential.<sup>6</sup> Assuming these two conditions are met, the requesting agency will, pursuant to paragraph 7(b) of the draft protective order, be granted access to confidential data on the same terms and conditions as the CEC.

We recognize that this two-step approach does not answer the question of how to handle access issues for public agencies and entities that might be considered Market Participating Parties (MPPs) under paragraph 3(h)(1), such as DWR, CPA and the Independent System Operator (ISO). Rather than attempt to resolve these issues at this time, we think the Commission needs to gain experience with this proceeding and consider such questions on a case-by-case basis. However, in making such determinations, it seems clear that at least three factors must be considered. The first is whether the confidential information can be shared with the other agency or entity without compromising its status as a record not open to public inspection under the Public Records Act. The second factor is whether harm to ratepayers is likely to flow from sharing the confidential information with the requesting agency or entity. The third factor, to be considered after the other two, is whether competitive harm is likely to flow from sharing the confidential information with the requesting agency or entity.

Paragraphs 1 and 2 of the draft protective order provide that, after notice and an opportunity to be heard, the order is subject to modification. As the Commission gains experience with the proceeding, a motion pursuant to these paragraphs will be the appropriate vehicle for determining whether the

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<sup>6</sup> The requirement of such an agreement is necessary to ensure that confidential data shared by agencies does not inadvertently become material “open to public inspection” under the Public Records Act.

definition of an MPP in paragraph 3(h)(1) needs to be modified so that confidential information can be shared with a public agency or entity such as DWR, CPA or the ISO.

It is also likely that other kinds of disputes will arise as to the meaning of particular provisions in the Protective Order. To deal with this, paragraph 13 requires that in the first instance, all such disputes must be presented for resolution to either the assigned ALJ or the Law and Motion ALJ. While paragraphs 13 and 17 recognize the right of parties to pursue additional forms of administrative and judicial relief after the ALJ has ruled, the requirement that they present their disputes to the ALJs first will help to ensure that the provisions of the Protective Order are interpreted consistently.

Hopefully, other provisions in the order will serve to reduce the number of requests for confidential data, and thus the number of disputes. For example, by requiring that redacted versions of documents “shall be sufficiently detailed in organization so that persons familiar with this proceeding . . . can determine with reasonable certainty the nature (but not the magnitude) of the data that has been redacted,” paragraph 5 serves to ensure that parties will be less likely to request confidential data that is not directly of concern to them.

Finally, it should be noted that the definition of an MPP in paragraph 3(h)(1) includes trade associations that are “comprised of [private, municipal, state or federal] entities that engage in one of more” of the market-related activities that give rise to designation as an MPP. The intent of this provision is that a trade association such as IEP should enjoy no greater access to Protected Materials than would its MPP members.

### **Opportunity for Comment on Draft Protective Order**

As noted above, the last discussions among all the interested parties on the appropriate text for the protective order took place at the end of January, before

the issuance of the April 2 Scoping Memo and ALJ Walwyn's ruling of April 10, 2002. Moreover, the draft Protective Order attached to this ruling contains a significant amount of new material that was not in the language circulated among the parties in January. In light of this situation, it makes sense to give the parties an opportunity to review the attached order to identify major drafting errors, if any.

Of necessity, however, that opportunity for review must be brief. Under ALJ Walwyn's ruling of April 10, 2002, the respondent utilities' forecasts are due on April 29, and requests for confidential data can be expected soon thereafter. Accordingly, it would be advantageous to have a protective order in place by the close of business on Monday, April 29. I am therefore directing interested parties to review the attached draft protective order and notify me by e-mail of any major drafting errors they identify that need immediate correction no later than 3 p.m. on Friday, April 26, 2002. These e-mail comments should also be served electronically on the service list and filed no later than April 29, 2002 with the Docket Office.

By "major drafting errors," I mean serious wording problems that fail to carry out the evident intent expressed in the draft Protective Order as well as this interpretive ruling. Parties should not reargue positions that are clearly rejected in the draft Protective Order, or that were rejected during the PHC or conference calls described above. It would also not be proper to identify as a major drafting error a matter that is intended to be handled through the modification process, such as the likely need to modify the definition of MPP discussed above.

A final word is necessary about some of the abbreviations used in the draft Protective Order. As pages 10-12 of the April 2 Scoping Memo make clear, the assigned Commissioner has a preference for the procurement and cost recovery mechanisms proposed by Edison in its November 26, 2001 filing. For that reason,

the draft Protective Order uses Edison's terminology and refers to its November 26 filing in defining such concepts as a "procurement plan," but otherwise refers to the utility as "IOU". Each of the three respondent utilities will be required to submit a version of the Protective Order using its own name, and -- in the absence of a ruling from me indicating that major drafting errors have been identified -- should do so no later than 5 p.m. on Monday, April 29, 2002.

In accordance with the discussion above, **IT IS RULED** that:

1. The Protective Order attached to this ruling is adopted, subject only to the possibility that, after review of the order, the parties to this proceeding may persuade the undersigned that the attached order contains one or more major drafting errors that require immediate correction.

2. Any party that believes it has identified a major drafting error as defined above shall send an e-mail to the undersigned at [mck@cpuc.ca.gov](mailto:mck@cpuc.ca.gov) identifying the error and proposing a solution no later than 3 p.m. on Friday, April 26, 2002.

3. Any such e-mail shall also be served electronically on the service list for this proceeding, and shall also be filed in paper form with the Commission's Docket Office no later than the close of business on Monday, April 29, 2002.

4. Unless an e-mail message is received from the undersigned stating that a major drafting error has been identified in the attached Protective Order that requires immediate correction, each of the three respondent utilities shall submit a form of the protective order using the utility's own name no later than the close of business on Monday, April 29, 2002. This individualized protective order shall be sent by e-mail to the undersigned and all parties on the service list, and shall



R.01-10-024 MCK/tcg

be filed in paper form with the Docket Office no later than the close of business on Tuesday, April 30, 2002.

Dated April 25, 2002, at San Francisco, California.

/s/ A. KIRK MCKENZIE

A. Kirk McKenzie  
Administrative Law Judge

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Establish  
Policies and Cost Recovery Mechanisms for  
Generation Procurement and Renewable  
Resource Development.

Rulemaking 01-10-024

**PROTECTIVE ORDER REGARDING CONFIDENTIALITY OF [SCE, PG&E or  
SDG&E]<sup>1</sup> POWER PROCUREMENT INFORMATION**

1. This Protective Order shall govern access to and the use of all Protected Materials in this proceeding as hereinafter defined. Notwithstanding any order terminating this docket, this Protective Order shall remain in effect until, after notice and an opportunity to be heard, it is specifically modified or terminated by the Assigned Commissioner, the Assigned Administrative Law Judge (“Assigned ALJ”), the Law and Motion Administrative Law Judge (“Law and Motion ALJ”) or the California Public Utilities Commission (“CPUC” or “Commission”).

2. The parties acknowledge that in view of the Assigned Commissioner’s Ruling Establishing Category and Providing Scoping Memo issued in this docket on April 2, 2002, this proceeding will be comprised of a single phase devoted to the review of energy procurement plans and the development of interim procurement cost recovery mechanisms for the period through December 31, 2003. The parties also acknowledge that the amount of data that is confidential or

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<sup>1</sup> It is contemplated that each utility will separately execute this Protective Order. For the purposes of this revised draft, the term “IOU” will be used in place of the name of the individual utility.

proprietary, and the identity of the parties submitting such data, may differ from time to time, depending on whether specific procurement plans or broader policy issues are under consideration. In light of this situation, the parties agree that modifications to this Protective Order may become necessary, and they further agree to work cooperatively with the Assigned ALJ, the Law and Motion ALJ, the Assigned Commissioner or the full Commission, as the case may be, to devise and implement such modifications in as timely a manner as possible.

3. **Definitions** -- The terms in this first definitional paragraph shall have a meaning consistent with the ideas set forth in the “Procurement Planning Proposals of the Southern California Edison Company [Edison] In Response to Order Instituting Rulemaking 01-10-024” (Edison Procurement Proposals) submitted in this docket on November 26, 2001. The term “**Procurement Plan**” means the type of plan for purchasing energy and/or capacity set forth in Section II.B. (at pages 39-55) of the Edison Procurement Proposals, whether the reference is to the type of initial Procurement Plan submitted by Edison or an update thereof. The term “**Procurement Plan Compliance Submittal**” refers to any one or more of the various types of filings intended to demonstrate the utility's compliance with an approved Procurement Plan, as described in Section II.C. (at pages 55-58) of the Edison Procurement Proposals. The term “**Notice of Objection**” refers to the pleading that Commission Staff (as defined below) may submit objecting to a Procurement Plan Compliance Submittal or a transaction for which the utility is seeking pre-approval by the Commission, as set forth in Sections II.C.1. and II.D., respectively, of the Edison Procurement Proposals. Nothing in this first definitional paragraph shall be construed as an endorsement of any timeframe proposed in the Edison Procurement Proposals, as these are matters to be determined in interim decisions or a final decision in this docket.

- a) The term “redacted” refers to situations in which confidential or proprietary information in a document, whether the document is in paper or electronic form, has been covered, masked or blocked out. Thus, the “redacted version” of a document is one in which the document is complete except that the confidential or proprietary information contained therein is not visible because it has been covered, masked or blocked out. The term “unredacted” refers to situations in which confidential or proprietary information in a document, whether in paper or electronic form, has not been covered, masked or blocked out. Thus, the “unredacted version” of a document is one in which the document is complete, and the confidential or proprietary information contained therein is visible.
- b) The term “Protected Materials” means the confidential or proprietary information contained in the unredacted version, and not contained in the redacted version, of any of the following: (A) any initial Procurement Plan submitted as a compliance filing by [IOU] in this proceeding, and any subsequent revisions thereof; (B) any materials submitted or produced in connection with the review, revision or approval of any initial or revised [IOU] Procurement Plan; (C) any Procurement Plan Compliance Submittal that [IOU] may submit from time to time to the Commission's Energy Division and/or the Office of Ratepayer Advocates (which Division and Office, whether separately or collectively, are hereinafter referred to as “Commission Staff”); (D) any Notice of Objection prepared and sent by Commission Staff to [IOU] in response to a Procurement Plan Compliance Submittal; and (E) any materials submitted or produced in connection with the determination of the reasonableness of any energy procurement transaction which is the subject of any such Notice of Objection. The reviews described in this paragraph are collectively referred to hereinafter as the “[IOU] Procurement Plan and Compliance Reviews.”

- c) Protected Material shall also include: (A) any information contained in or obtained from the unredacted materials described in the preceding paragraph; (B) any other materials that are made subject to this Protective Order by any assigned ALJ, Law and Motion ALJ, or Assigned Commissioner, or by the CPUC or any court or other body having appropriate authority; (C) notes of Protected Materials; and (D) copies of Protected Materials. [IOU] and Commission Staff, when creating any Protected Materials, shall physically mark such materials on each page (or in the case of non-documentary materials such as computer diskettes, on each item) as "PROTECTED MATERIALS", or with words of similar import as long as one or more of the terms, "Protected Materials," "Section 583" or "General Order No. 66-C" is included in the designation to indicate that the materials in question are Protected Materials.
- d) The term "Notes of Protected Materials" means memoranda, handwritten notes, or any other form of information (including information in electronic form) that copies or discloses materials described in Paragraph 3(b). Except as specifically provided otherwise in this Order, notes of Protected Materials are subject to the same restrictions as are Protected Materials.
- e) Protected Materials shall not include: (A) any information or document contained in the public files of the CPUC or any other state or federal agency, or in any state or federal court, unless such information or document has been determined to be protected by such agency or court; or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order.
- f) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto as Appendix A by which persons who have been granted access to the Protected Materials of [IOU] shall, as a condition of such access, certify their understanding that such access is provided pursuant to the terms and restrictions of this Protective Order, and that such persons have read such Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be sent to and retained by [IOU].

g) The term Non-Market Participating Party (“NMPP”) Reviewing Representative shall mean a person who is:

- 1) An employee of: (a) a state governmental agency other than the California Energy Commission (CEC) that (i) is not a Market Participating Party as defined in Paragraph 3(h)(1) hereof, and (ii) is statutorily authorized to obtain access to confidential data held by another state governmental agency upon execution of a written agreement to treat the data so obtained as confidential, as provided in Government Code Section 6254.5(e); or (b) any other consumer or customer group that [IOU] and Commission Staff agree has a bona fide interest in participating on behalf of end-use customers in Procurement Plan and Compliance Reviews regarding [IOU], and which group is not a Market Participating Party as defined in paragraph 3(h)(1); or
- 2) An attorney, paralegal, expert or employee of an expert retained by an NMPP for the purpose of advising, preparing for or participating in Procurement Plan and Compliance Reviews regarding [IOU].
- 3) NMPPs shall identify their proposed Reviewing Representatives to [IOU] and Commission Staff and provide a curriculum vitae of the candidate, including a brief description of the candidate’s professional experience and past and present professional affiliations for the last 10 years. [IOU] and Commission Staff shall advise the proposing party in writing within three (3) business days from receipt of the notice if either or both of them object to the proposed Reviewing Representative, setting forth in detail the reasons therefor. In the event of such objection, the proposing party, [IOU] and Commission Staff shall promptly meet and confer to try to resolve the issue, and if necessary seek a ruling from either the assigned ALJ or the Law and Motion ALJ. In addition to determining whether the proposed Reviewing Representative has a need to know, the ALJ in ruling on the issue will evaluate whether the candidate is engaged in the purchase, sale or marketing of energy or capacity (or the direct supervision of any employee(s) whose duties include such activities), or the bidding on or purchasing of power plants or

consulting on such matters (or the direct supervision of any employee(s) whose duties include such bidding, purchasing or consulting). Absent unusual circumstances as determined by the ALJ, a candidate who falls within the criteria set forth in the preceding sentence will ordinarily be deemed ineligible to serve as an NMPP Reviewing Representative.

h) The term Market Participating Party ("MPP") Reviewing Representative shall mean a person who is:

- 1) An employee of a private, municipal, state or federal entity that engages in the purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or consulting on such matters, or an employee of a trade association comprised of such entities that engage in one or more of such activities; or
- 2) An attorney, paralegal, expert or employee of an expert retained by an MPP for the purpose of advising, preparing for or participating in Procurement Plan and Compliance Reviews regarding [IOU].

4. Access of NMPP Reviewing Representatives to Protected Materials shall be granted only pursuant to the terms of this Protective Order. Participants in this proceeding who are designated as MPP Reviewing Representatives shall not be granted access to Protected Material, but shall instead be limited to reviewing redacted versions of documents that contain Protected Material.

5. Whenever [IOU] submits a document in this proceeding that includes data that [IOU] contends is confidential or proprietary, [IOU] shall also prepare a redacted version of such document. The redacted version shall be sufficiently detailed in organization so that persons familiar with this proceeding (including MPP Reviewing Representatives) can determine with reasonable certainty the nature (but not the magnitude) of the data that has been redacted. The redacted version of any document required by this paragraph shall be served on all persons on the service list (or, in the case of discovery, on all persons entitled to

the discovery responses) who are not entitled to obtain access to Protected Material hereunder. All disputes regarding redacted versions of documents shall be submitted for resolution to the CPUC in accordance with Paragraph 13 of this Protective Order.

6. Within thirty (30) days after (a) the issuance of a Commission resolution regarding an [IOU] Procurement Plan, or (b) the date on which an [IOU] Procurement Plan Compliance Review becomes final and no longer subject to judicial review, an NMPP Reviewing Representative shall, if requested to do so in writing by [IOU], return or destroy the Protected Materials. Within the same 30-day time period, the NMPP Reviewing Representative shall also submit to [IOU] and Commission Staff an affidavit stating that, to the best of the NMPP Reviewing Representative's knowledge, all Protected Materials subject to the request have been returned or destroyed. Notwithstanding the two preceding sentences, the NMPP Reviewing Representative may retain Notes of Protected Materials and copies of filings, official transcripts and exhibits, if any, prepared in the course of the NMPP Reviewing Representative's review of the Protected Materials, provided that such retained materials are maintained in accordance with Paragraphs 9 and 12 below. In the event the CEC receives a request that Protected Materials should be returned or destroyed, but the CEC Executive Director determines that the CEC needs to retain some or all of these Protected Materials to carry out its statutorily-mandated tasks, the CEC may retain the Protected Materials, and the CEC Executive Director shall furnish [IOU] and Commission Staff with a letter setting forth the CEC's reasons for retaining the Protected Materials, as well as a list enumerating with reasonable particularity the Protected Materials so retained. To the extent Protected Materials are not returned or destroyed pursuant to this paragraph, they shall remain subject to



this Protective Order, Section 583 of the California Public Utilities Code and CPUC General Order No. 66-C.

7. (a) In the event that the CPUC receives a request for a copy of or access to any Protected Material from the CEC, the procedure for handling such requests shall be as follows. The CPUC, after giving written notice to [IOU] of the request for the Protected Material, shall release such Protected Material to the CEC upon receipt from the CEC of an Interagency Information Request and Confidentiality Agreement (Interagency Confidentiality Agreement) identical in form to the agreement set forth in Appendix B hereto. Such Interagency Confidentiality Agreement shall (i) provide that the CEC will treat the requested Protected Material as confidential in accordance with this Protective Order, (ii) include an explanation of the purpose for the CEC's request, as well as an explanation of how the request relates to furtherance of the CEC's functions, (iii) be signed by a person authorized to bind the CEC contractually, and (iv) expressly state that furnishing of the requested Protected Materials to employees or representatives of the CEC does not, by itself, make such Protected Materials public. In addition, the Interagency Confidentiality Agreement shall include an express acknowledgment of the CPUC's sole authority (subject to judicial review) to make the determination whether the Protected Material should remain confidential or be disclosed to the public, notwithstanding any provision to the contrary in the statutes or regulations applicable to the CEC.

7. (b) In the event the CPUC receives a request for a copy of or access to Protected Material from a state governmental agency other than the CEC that is authorized to enter into a written agreement sufficient to satisfy the requirements for maintaining confidentiality set forth in Government Code Section 6254.5(e), the CPUC may, after giving written notice to [IOU] of the request, release such Protected Material to the requesting governmental agency, upon receiving from

the requesting agency an executed Interagency Confidentiality Agreement that contains the same provisions described in Paragraph 7(a) above, and that is otherwise substantively identical to the draft agreement set forth in Appendix B; *i.e.*, identical as to legal principles but with variations in language that are necessary due to the particular situation of the requesting agency.

8. If a request is made pursuant to the Public Records Act (PRA), Government Code § 6250, *et seq.*, that Protected Materials filed with or otherwise in the possession of the CPUC be produced, the CPUC will notify [IOU] of the PRA request and will notify the requester that the Protected Materials are public records that fall within the exclusions listed in Section 2 of General Order No. 66(c), and/or that there is a public interest served by withholding the records. *See* paragraphs 2.2 and 3.3 of General Order No. 66-C. In the event that a PRA requester brings suit to compel disclosure of Protected Materials, the CPUC will promptly notify [IOU] of such suit, and Commission Staff and [IOU] shall cooperate in opposing the suit.

9. Protected Materials shall be treated as confidential by each NMPP Reviewing Representative in accordance with the certificate executed pursuant to Paragraphs 3(f) and 11 hereof. Protected Materials shall not be used except as necessary for the conduct of this proceeding, and shall not be disclosed in any manner to any person except (i) other NMPP Reviewing Representatives who are engaged in this proceeding and need to know the information in order to carry out their responsibilities, and (ii) persons employed by or working on behalf of the CEC or other state governmental agencies covered by Paragraphs 7(a) or 7(b).

10. It shall be a rebuttable presumption that (i) any study that incorporates, describes or otherwise employs Protected Material in a manner that could reveal all of a part of the Protected Material, or (ii) any model that relies upon Protected Material for algorithms or other computation(s) critical to the functioning of the

model, shall also be considered Protected Material that is subject to Section 583 of the Public Utilities Code, the Commission's General Order 66-C, and this Protective Order. However, models that merely use Protected Material as inputs will not themselves be considered Protective Material. It shall also be a rebuttable presumption that where the inputs to studies or models include Protected Material, or where the outputs of such studies or models reveal such inputs or can be processed to reveal the Protected Material, such inputs and/or outputs shall be considered Protected Material subject to this Protective Order, unless such inputs and/or outputs have been redacted or aggregated to the satisfaction of the party producing the Protected Material. Unless a party, by means of notice and motion, obtains a ruling from the Assigned ALJ or the Law and Motion ALJ holding that the applicable presumption(s) from among the foregoing has been rebutted with respect to the model or study at issue, then any party who devises or propounds a model or study that incorporates, uses or is based upon Protected Material shall label the model or study "Protected Material," and it shall be subject to the terms of this Protective Order.

11. No NMPP Reviewing Representative shall be permitted to inspect, participate in discussions regarding, or otherwise be granted access to Protected Materials pursuant to this Protective Order unless such NMPP Reviewing Representative has first executed a Non-Disclosure Certificate and delivered it to [IOU]. [IOU] shall provide copies of executed Non-Disclosure Certificates to Commission Staff. Attorneys qualified as NMPP Reviewing Representatives shall ensure that persons under their supervision or control comply with this Protective Order.

12. In the event that an NMPP Reviewing Representative to whom Protected Materials are disclosed ceases to be engaged in Procurement Plan and Compliance Reviews concerning [IOU], or is employed or retained for a position

whose employer is not qualified to be an NMPP under Paragraph 3(g)(1), then access to Protected Materials by that person shall be terminated. Even if no longer engaged in such reviews, every such person shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Certificate.

13. All disputes arising under this Protective Order shall be presented for resolution to the Assigned ALJ or the Law and Motion ALJ. Prior to presenting any such dispute to the applicable ALJ, the parties to the dispute shall use their best efforts to resolve it. Neither [IOU] nor the Commission Staff waives its right to seek additional administrative or judicial remedies after the Assigned ALJ or the Law and Motion ALJ has made a ruling regarding the dispute.

14. All documents containing Protected Material that are filed with the Commission or served on parties to this proceeding shall be placed in sealed envelopes or other appropriate containers, endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked with the words “**PROTECTED MATERIALS**” or one of the other, similar terms set forth in paragraph 3(c) hereof, and shall be filed under seal and served upon all NMPP Reviewing Representatives and persons employed by or working on behalf of the state governmental agencies referred to in Paragraphs 7(a) and 7(b) who are eligible to see the Protected Materials.

15. Nothing in this Protective Order shall be construed as limiting the right of [IOU], Commission Staff, a NMPP or a state governmental agency covered by Paragraph 7(a) or 7(b) from objecting to the use of Protected Material on any legal ground, such as relevance or privilege.

16. All Protected Materials filed with judicial or administrative bodies other than the Commission, whether in support of or as a part of a motion, brief or other document or pleading, shall be filed and served in sealed envelopes or

other appropriate containers bearing prominent markings indicating that the contents include Protected Materials that are subject to this Protective Order.

17. Neither [IOU] nor the Commission Staff waives its right to pursue any other legal or equitable remedy that may be available in the event of actual or anticipated disclosure of Protected Materials.

18. [IOU] and Commission Staff may agree at any time to remove the “Protected Material” designation from any material if, in their mutual opinion, its confidentiality is no longer required. In such a case, [IOU] will notify all parties that [IOU] believes are in possession of such materials of the change of designation.

Dated April 25, 2002, at San Francisco, California.

/s/ A. KIRK MCKENZIE

A. Kirk McKenzie  
Administrative Law Judge

**APPENDIX A**  
**Page 1**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Establish  
Policies and Cost Recovery Mechanisms for  
Generation Procurement and Renewable  
Resource Development.

Rulemaking 01-10-024

**NON-DISCLOSURE CERTIFICATE**

I, \_\_\_\_\_, have been asked by \_\_\_\_\_ to  
inspect certain materials that have been designated as “Protected Materials”  
under Paragraph \_\_\_\_ of the Protective Order entered in the above-captioned  
matter on \_\_\_\_\_, 2002 (the “Order”).

1. I hereby certify my understanding that access to Protected Materials is  
provided to me pursuant to the terms and restrictions of the Order in this  
proceeding, that I have been given a copy of and have read the Order, and that I  
agree to be bound by it. I understand that the contents of the Protected Materials,  
any notes or other memoranda, or any other form of information that copies or  
discloses Protected Materials shall not be disclosed to anyone other than in  
accordance with the Order. I acknowledge that a violation of this certificate  
constitutes a violation of an order of the California Public Utilities Commission.

2. I understand that my review of Protected Materials is solely for the  
purpose of participating in the above-captioned matter, and that any other use or  
disclosure of Protected Materials by me is a violation of the Order.

**APPENDIX A**  
**Page 2**

3. I hereby agree to submit to the exclusive jurisdiction of the California Public Utilities Commission for the enforcement of the undertakings I have made hereby and I waive any objection to venue laid with the Commission for enforcement of the Order.

Dated:

**BY:** \_\_\_\_\_

**TITLE:**\_\_\_\_\_

**REPRESENTING:**\_\_\_\_\_

**APPENDIX B**

**Page 1**

**INTERAGENCY INFORMATION REQUEST AND  
CONFIDENTIALITY AGREEMENT BETWEEN THE CALIFORNIA PUBLIC  
UTILITIES COMMISSION AND THE CALIFORNIA ENERGY RESOURCES  
CONSERVATION AND DEVELOPMENT COMMISSION**

**A. INTERAGENCY INFORMATION REQUEST**

The California Energy Resources Conservation and Development Commission ("CEC") hereby requests the following information from the California Public Utilities Commission ("Commission") provided to the Commission by [IOU] pursuant to the Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development, issued on October 25, 2001 by the Commission as Rulemaking (R.) 01-10-024:

[List of Information Requested]

[IOU] has provided the above-described data to the Commission and the Commission is treating the data as confidential pursuant to the Public Utilities Code §583.

The CEC declares that it has a need for the above-described data for the following purposes:

1. [to be added]
2. [to be added]
3. [to be added]

The CEC agrees to keep this information confidential in its entirety, disclosing it only to its employees and representatives whose work requires them to review and analyze such data.



## **APPENDIX B**

### **Page 2**

#### **B. CONFIDENTIALITY AGREEMENT**

1. This agreement is limited to records that are not open to public inspection, that are in the possession and control of the Commission, and that are identified above.
2. The Commission shall permit the CEC to review and copy the records identified above that are not open to public inspection ("confidential records"), upon the representation of an authorized representative of the CEC that the confidentiality of such records will be maintained and that they will not be made available for inspection by any other governmental agency, or by the public, except as provided for herein.
3. The CEC agrees that the confidential records identified above shall be released only to persons authorized in writing by the person(s) in charge of the CEC to obtain the confidential records, and that the CEC will inform each of its employees, and any consultants or contractors who have access to the confidential records, that they are subject to the requirements of this confidentiality agreement. The CEC shall have each such consultant or contractor sign the attached "acknowledgment" form obligating the consultant or contractor to comply with this agreement. The CEC further agrees that it will require each such consultant or contractor to inform the consultant's or contractor's employees that they are subject to this Confidentiality Agreement, and to have each such employee with access to the confidential records sign the attached acknowledgement form. Copies of the signed acknowledgment forms will be provided to the Commission upon request.
4. The CEC shall take reasonable security precautions to keep confidential the records provided to the CEC pursuant to this agreement. The CEC shall notify the Commission immediately upon the discovery of any unauthorized use or disclosure of the confidential records or of any other breach of this agreement, and will cooperate in every reasonable way to help the Commission prevent further unauthorized disclosure or use of the confidential records covered by this agreement.

**APPENDIX B**

**Page 3**

5. The Commission reserves its authority under Section 583 of the California Public Utilities Code and General Order 66-C to consider and determine whether the records identified above should be made available for public inspection. The CEC agrees that its Executive Director will not exercise his authority under California Code of Regulations, title 20, section 2507(e), and will not release any confidential records or other documents designated as confidential by the CPUC in R.01-10-024 unless explicitly authorized by the CPUC.
6. In the event the CEC determines for any reason that it is required, or that it would be desirable, to disclose or make available the contents of the confidential records identified above to other governmental agencies or to the public, the CEC agrees not to do so without first notifying the Commission of its intent and the reason for the requested disclosure. The CEC further agrees that such notice shall be given be no less than 20 days prior to the planned disclosure in order that the Commission, the Assigned Commissioner for R.01-10-024, the Assigned Administrative Law Judge (ALJ) for that proceeding or the Law and Motion ALJ, as the case may be, can give adequate consideration, in accordance with Section 583 of the Pubic Utilities Code and the Commission's General Order 66-C, to the issue of whether it is in the public interest to make such records available to other governmental agencies or to the public. The CEC agrees to abide by the determination of the Commission, the Assigned Commissioner or the applicable ALJ on this issue, but may appeal such determination pursuant to the CPUC's Rules of Practice and Procedure.
7. With respect to the use of data by the CEC contained in the confidential records subject to this agreement ("confidential data"), it shall be a rebuttable presumption that (i) any study that incorporates, describes or otherwise employs such confidential data in a manner that could reveal all or part of the confidential data, or (ii) any model that relies upon such confidential data for algorithms or other computation(s) critical to the functioning of the model, shall also be considered a confidential record subject to Section 583 of the Public Utilities Code, the Commission's General Order 66-C, and this agreement. However, models that merely use confidential data as inputs will not themselves be considered such confidential records. It shall also be a rebuttable presumption that where the inputs

**APPENDIX B**

**Page 4**

to studies or models include confidential data, or where the outputs of such studies or models reveal the inputs or can be processed to reveal the confidential data, such inputs and/or outputs shall be considered confidential records subject to this agreement, unless such inputs and/or outputs have been redacted or aggregated to the satisfaction of the party producing the confidential records. Any disputes concerning the appropriate scope of redaction or aggregation that the CEC and the party producing the confidential records cannot resolve shall be presented for resolution to the Assigned ALJ for R.01-10-024 or to the Law and Motion ALJ.

8. This agreement shall continue in effect unless or until either of the undersigned parties determines that the agreement should be terminated. Unless otherwise provided for by the written agreement of both the CEC and the Commission, unilateral termination of this agreement shall be effected no sooner than 30 days from the date that either party provides notice, in writing, of its intent to terminate this agreement. All obligations created by this agreement during its term shall survive termination of the agreement.
9. This agreement shall not be modified except by a written agreement dated subsequent to the date of this agreement and signed by authorized representatives of both parties. None of the provisions of this agreement shall be deemed to have been waived by any act or acquiescence on the part of either party, its agents, or employees, but only by an instrument in writing signed by an authorized representative of the party. No waiver of any provisions of this agreement shall constitute a waiver of any other provisions(s) or of the same provision on another occasion.
10. If any provision of this agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect.

Name\_\_\_\_\_

Position at the CEC: \_\_\_\_\_

Dated:\_\_\_\_\_

\_\_\_\_\_  
General Counsel  
California Public Utilities  
Commission

Dated:\_\_\_\_\_

**APPENDIX B**

**Page 5**

ACKNOWLEDGEMENT AND ACCEPTANCE OF THE REQUIREMENTS OF  
THE CONFIDENTIALITY AGREEMENT BETWEEN THE CALIFORNIA STATE  
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION (CEC) AND THE CALIFORNIA PUBLIC UTILITIES  
COMMISSION FOR CEC CONSULTANTS AND CONTRACTORS

The Undersigned acknowledges that he/she/it has received copies of the Interagency Information Request and Confidentiality Agreement Between the California Public Utilities Commission (CPUC) and the California Energy Resources Conservation and Development Commission (CEC) dated \_\_\_\_\_ (Interagency Confidentiality Agreement), Public Utilities Code Section 583 and CPUC General Order 66-C. The undersigned acknowledges that he/she/it will be subject to the requirements of the Interagency Confidentiality Agreement, and agrees to be bound by the requirements set forth therein.

Signed: \_\_\_\_\_

Name \_\_\_\_\_

Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Dated: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Concerning Draft Protective Order on all parties of record in this proceeding or their attorneys of record.

Dated April 25, 2002, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.